A **DATO' SERI ANWAR IBRAHIM**

v.

PP

B COURT OF APPEAL, PUTRAJAYA
AZIAH ALI JCA
ROHANA YUSOF JCA
MOHD ZAWAWI SALLEH JCA
[CRIMINAL APPLICATION NO: W-05-19-01-2012]
C 20 DECEMBER 2013

CRIMINAL PROCEDURE: *Prosecution - Prosecuting officer - Application for disqualification of - Whether appointment of Deputy Public Prosecutor would deprive applicant's right to fair trial*

D ***CRIMINAL PROCEDURE:*** *Prosecution - Public Prosecutor - Appointment of Deputy Public Prosecutor - Whether in exercise of statutory duty - Whether Public Prosecutor obliged to provide reason for appointment - Whether court entitled to presume that official acts had been* E *regularly performed in absence of evidence of mala fide or malice - Evidence Act 1950, s. 114(e)*

EVIDENCE: *Statutory declaration as evidence - Relevancy - Whether statutory declaration relevant to facts of case - Whether maker available for cross-examination - Whether there was discrepancy in identity of* F *maker - Whether contents of statutory declaration hearsay - Whether admissible as evidence*

The applicant, *via* encl. 48a, sought to disqualify Tan Sri Muhammad Shafee bin Md Abdullah ('Shafee') from leading the G prosecution team in their appeal against the applicant's acquittal on a sodomy charge. The applicant's affidavit in support of the application was anchored on the facts found in the statutory declaration ('SD') made by one Datuk Mat Zain bin Ibrahim ('Mat Zain') and contended that Shafee was not a fit and proper person H to be appointed as the Deputy Public Prosecutor as he would not be able to prosecute the appeal independently, fairly and impartially without being actuated by personal motive. Accordingly, it was contended that it would prejudice the rights of the applicant to a fair trial and equal treatment before the law. In reply, Shafee I submitted that the SD was hearsay and contained frivolous allegations which could not be relied upon to prove the allegations

contained therein as the maker, Mat Zain, was not available for cross-examination and he had not deposed any affidavit and neither was he a party in the proceedings.

Held (dismissing application)
Per Aziah Ali JCA delivering the judgment of the court:

(1) A plain reading of the SD revealed that the allegations in the SD bore no relevance to the facts of the present case as they mainly relate to the 'black eye' incident which had been concluded in other earlier proceedings. (para 14)

(2) Mat Zain had not deposed any affidavit for the purpose of this application and the SD was referred to only in the body of the applicant's affidavit. The contents of the SD was hearsay evidence for the reason that the maker of the SD was not available for cross-examination to enable the court to determine the truth or otherwise of the serious allegations levelled at the persons mentioned in the SD. There were also latent defects in the SD in view of the uncontroverted evidence that there were discrepancies in the identity of the maker of the SD, Mat Zain. In the circumstances, the SD could not be admitted as evidence which consequently rendered the application unsupported by cogent and credible evidence. (paras 15 & 16)

(3) The prosecution of the appeal by Shafee would undoubtedly rest solely on the appeal records prepared by the court. There was no possibility that any evidence favourable to the applicant would be concealed or withheld from the court. Further, Shafee was not the sole DPP appearing for the Public Prosecutor in the appeal as there are two senior DPPs from the Attorney General's Chambers. The role and functions of a DPP as well as defence counsel is to assist the court in reaching its decision and to do so, the court will examine and scrutinise the entire appeal records. It was therefore inconceivable to suggest that the mere appointment of Shafee to conduct the appeal would deprive the applicant's right to a fair trial. (para 18)

(4) In the appointment of Shafee, the Public Prosecutor was exercising a statutory duty under which no obligation was imposed on him to provide reasons in the exercise of such duty. To require the Public Prosecutor to provide reasons in

A the exercise of his discretionary power would undoubtedly place upon him an onerous duty not contemplated by the relevant statutes. (para 21)

(5) There was no compelling and cogent evidence that had been B adduced to show that the Public Prosecutor had abused the power conferred upon him to appoint Shafee to conduct the prosecution of the appeal. Under s. 114(e) of the Evidence Act 1950, the court is entitled to presume that official acts have been regularly performed in the absence of evidence of C *mala fide* or malice. Therefore, the appointment of Shafee was in accordance with the law. (para 20)

Bahasa Malaysia *Translation Of Headnotes*

Pemohon, melalui lampiran 48a, memohon untuk penyingkiran Tan D Sri Muhammad Shafee bin Md Abdullah ('Shafee') daripada mengetuai pasukan pendakwaan dalam rayuan mereka terhadap pelepasan pemohon atas pertuduhan liwat. Afidavit menyokong permohonan pemohon diasaskan atas fakta yang didapati dalam akuan berkanun ('akuan') yang dibuat oleh Datuk Mat Zain bin E Ibrahim ('Mat Zain') dan menghujahkan bahawa Shafee bukan seorang yang layak dan patut dilantik sebagai Timbalan Pendakwa Raya ('TPR') kerana dia tidak boleh membuat dakwaan bagi rayuan tersebut secara bebas, adil dan saksama tanpa didorong oleh motif peribadi. Dengan itu, adalah dihujahkan bahawa ia akan F memprejudiskan hak pemohon untuk memperoleh perbicaraan yang adil dan layanan yang saksama di sisi undang-undang. Dalam jawapannya, Shafee menghujahkan bahawa akuan tersebut adalah dengar cakap dan mengandungi dakwaan-dakwaan remeh yang tidak boleh disandarkan untuk pembuktian dakwaan-dakwaan yang G terkandung di dalamnya kerana pembuatnya, Mat Zain, tiada untuk disoal balas dan dia tidak mengikrarkan apa-apa afidavit dan juga bukan pihak dalam prosiding.

Diputuskan (menolak permohonan)

H **Oleh Aziah Ali HMR menyampaikan penghakiman mahkamah:**

(1) Pembacaan semata-mata akuan tersebut mendedahkan bahawa dakwaan-dakwaan dalam akuan tersebut tidak relevan kepada fakta kes ini kerana ia lebih berkait dengan insiden 'black eye' I yang telah diputuskan dalam prosiding terdahulu.

(2) Mat Zain tidak mengikrarkan apa-apa afidavit bagi tujuan permohonan ini dan akuan yang dirujuk hanyalah dalam kandungan afidavit pemohon. Kandungan akuan tersebut adalah keterangan dengar cakap atas alasan bahawa pembuat akuan tersebut tidak hadir untuk disoal balas bagi membolehkan mahkamah menentukan kebenaran atau sebaliknya dakwaan-dakwaan yang diarahkan kepada orang yang disebut dalam akuan tersebut. Juga terdapat kecacatan yang tidak ketara dalam akuan tersebut memandangkan keterangan yang tidak dipertikaikan bahawa terdapat percanggahan dalam identiti pembuat akuan tersebut, Mat Zain. Dalam keadaan tersebut, akuan tersebut tidak boleh diterima sebagai keterangan yang dengan itu menjadikan permohonan tidak disokong oleh keterangan yang meyakinkan dan boleh dipercayai.

(3) Tidak diragui bahawa pendakwaan rayuan oleh Shafee akan bersandar atas rekod rayuan yang disediakan oleh mahkamah. Tidak ada kemungkinan bahawa apa-apa keterangan yang memihak kepada pemohon akan disembunyikan atau ditahan daripada mahkamah. Malahan, Shafee bukan satu-satunya TPR yang hadir bagi pihak Pendakwa Raya dalam rayuan tersebut, terdapat dua orang TPR kanan dari Jabatan Peguam Negara. Peranan dan fungsi TPR dan peguam pembelaan adalah untuk membantu mahkamah mencapai keputusannya dan untuk berbuat demikian mahkamah akan memeriksa dan meneliti keseluruhan rekod rayuan. Oleh itu, adalah salah tanggap untuk menyarankan bahawa perlantikan Shafee semata-mata untuk menjalankan rayuan akan menafikan pemohon hak untuk perbicaraan yang adil.

(4) Dalam perlantikan Shafee, Pendakwa Raya melaksanakan kewajipan statutori di mana tidak ada tanggungjawab ke atasnya untuk memperuntukkan alasan bagi pelaksanaan kewajipan tersebut. Untuk meminta Pendakwa Raya memberikan sebab bagi pelaksanaan kuasa budi bicaranya tidak diragui akan meletakkan ke atasnya tugas berat yang tidak dipertimbangkan oleh statut-statut yang relevan.

(5) Tiada keterangan yang mendesak dan meyakinkan yang telah dikemukakan untuk menunjukkan bahawa Pendakwa Raya telah menyalahgunakan kuasa yang diberikan kepadanya untuk melantik Shafee untuk menjalankan pendakwaan rayuan tersebut. Di bawah s. 114(e) Akta Keterangan 1950,

A mahkamah berhak untuk menganggap bahawa tindakan rasmi telah dilaksanakan secara betul dalam ketiadaan keterangan *mala fide* atau niat jahat. Oleh itu, perlantikan Shafee adalah menurut undang-undang.

B **Case(s) referred to:**
Ahmadi Yahya v. PP [2012] 7 CLJ 113 CA ***(refd)***
Chew Gim Ser v. PP [2005] 1 SLR 201 ***(refd)***
Earles Utilities Limited v. Jacob (1934) 51 TLR 43 ***(refd)***
Harun Abdullah v. PP [2009] 4 CLJ 717 CA ***(refd)***
Joseph Puspam v. Menteri Sumber Manusia, Malaysia & Anor [2001] 4 CLJ
C *252 CA* ***(refd)***
Law Society of Singapore v. Tan Guat Neo Phyllis [2008] 2 SLR(R) 239 ***(refd)***
Marneedi Satyam v. Masimukkula Venkataswami [1949] 1 MLJ 434 ***(refd)***
Mayban Assurance Bhd v. Sufian Mohd Said [1998] 1 LNS 18 HC ***(refd)***
D *PP v. Forster Frank Edald Heinrich [1987] 2 CLJ 177; [1987] CLJ (Rep) 872 HC* ***(refd)***
PP v. Lee Siew Ngock [1966] 1 LNS 143 HC ***(refd)***
Ramalingam Ravinthran v. Attorney-General [2012] 2 SLR 49 ***(refd)***
Shamugam S Kanapathy v. Pappah Chinniah Nadar [1994] 2 CLJ 265 HC ***(refd)***

E **Legislation referred to:**
Evidence Act 1950, s. 114(e)
Federal Constitution, arts. 5, 8
Legal Profession (Practice and Etiquette) Rules 1978, r. 28(c)

F *For the applicant - Tommy Thomas (Afiq Mohd Noor with him); M/s Karpal Singh*
For the respondent - Muhammad Shafee Abdullah (Mohamad Hanafiah Zakaria & Noorin Badaruddin with him); AG's Chambers

G *[Appeal from High Court, Kuala Lumpur; Criminal Trial No: 45-9-2009]*

Reported by S Barathi

H **JUDGMENT**
(Enclosure 48a)

Aziah Ali JCA:

[1] Enclosure 48a is the second application by the applicant,
I Dato' Seri Anwar bin Ibrahim to disqualify Tan Sri Muhammad Shafee bin Md Abdullah ("Shafee") from leading the prosecution team in their appeal against the applicant's acquittal on a sodomy charge.

[2] In support of his application, the applicant filed the following affidavits:

(a) affidavit in support of the applicant dated 5 December 2013;

(b) additional affidavit of Mohd Radzlan bin Jalaludin dated 10 December 2013; and

(c) second affidavit of the applicant dated 16 December 2013.

[3] In response to the applicant's affidavits, the respondent filed the following affidavits:

(a) affidavit of Shafee dated 10 December 2013;

(b) affidavit in reply (2) of Ramli bin Yusuff dated 10 December 2013;

(c) corrective affidavit to affidavit in reply (2) of Ramli bin Yusuff dated 11 December 2023;

(d) affidavit in reply to additional affidavit of Noorin binti Badaruddin dated 16 December 2013; and

(e) affidavit in reply (2) to the applicant's second affidavit of Shafee dated 18 December 2013.

[4] At the outset of the hearing of this application, learned counsel for the applicant, Encik Tommy Thomas, has taken an objection to Shafee arguing in opposition to the application on the ground that Shafee had affirmed affidavits as to disputed facts and therefore Shafee would be in breach of r. 28(c) of the Legal Profession (Practice and Etiquette) Rules 1978 ("the Rules") which states as follows:

> (c) This rule does not prevent an advocate and solicitor from swearing or affirming an affidavit as to formal or undisputed facts in matters in which he acts or appears.

[5] In response Shafee submits that in the first application the same objection had been raised by counsel for the applicant which was overruled by the Court of Appeal which had subsequently been brought as an appeal to the Federal Court wherein Shafee continued to prosecute.

[6] In the circumstances we see no reason to depart from the position taken by the Court of Appeal in the first application in respect of Shafee arguing this application. The objection is therefore overruled. This is to preserve the integrity of the judicial system and to prevent inconsistent decisions of the court.

[7] Before we embark upon the task of considering the merits or otherwise of this application, it is opportune for us to state the approach to be adopted in considering an application to disqualify a counsel. An application to disqualify a counsel ought to be considered in light of the principle that courts should not lightly interrupt the relationship between a lawyer and a client. The court should hesitate to order disqualification except where absolutely necessary and for good reasons. A disqualification may be ordered only if the court determines that a lawyer's continued participation as counsel taints the judicial system.

[8] The applicant bears the burden to establish with specificity a violation of one or more of the Rules, and mere allegation of unethical conduct or evidence showing a remote possibility of violation of the Rules will not suffice.

[9] We have read all the affidavits filed by the applicant carefully and meticulously. We discern that the applicant's affidavit in support of his application (encl. 48b) is anchored on the facts found in the statutory declaration ("SD") made by one Datuk Mat Zain bin Ibrahim ("Mat Zain") dated 7 October 2013 (exh. A1) which the applicant avers was brought to his attention on 2 December 2013 (para. 7 of encl. 48b).

[10] To put the matter in its correct perspective, it is apposite to reproduce below the facts found in the SD as averred by the applicant in para. 9 of his affidavit in support (encl. 48b) as follows:

(i) that Shafee knew of Gani's action in deliberately suppressing important evidence in the Pulau Batu Putih hearing at the International Court of Justice in 2007 that caused Malaysia to lose Pulau Batu Putih to Singapore;

(ii) that Shafee told Mat Zain that "you will not believe your eyes if you were to see the amount of cash that was transferred into Gani's account in Hong Kong";

(iii) that Shafee agreed with Mat Zain that Gani had fabricated evidence against the applicant during the 'black eye' investigation;

(iv) that Shafee agreed it was indeed true that Dr Abdul Rahman bin Yusof a forensic consultant at Kuala Lumpur Hospital had fabricated evidence in the applicant's 'black eye' investigation; and

(v) that Shafee was also of the view that the three member panel chaired by Federal Court Judge Abd Kadir Sulaiman and Court of Appeal Judges Mohd Noor Abdullah and Mohd Noor Ahmad who had in 2009 in a majority decision cleared Gani and former IGP Musa Hassan of allegations of tampering with the applicant's blood sample was in fact an unconstitutional sitting.

[11] Relying heavily on the above allegations by Mat Zain, the applicant contends that Shafee is not a fit and proper person to be appointed as Deputy Public Prosecutor ("DPP") to conduct the appeal as Shafee would not be able to prosecute the appeal independently, fairly, impartially without being actuated by personal motive. Accordingly this would prejudice the rights of the applicant to a fair trial and equal treatment before the law as enshrined in arts. 5 and 8 of the Federal Constitution.

[12] In reply, the main thrust of Shafee's submissions in objecting to the application is this: that the SD is hearsay and contains frivolous allegations which cannot be relied upon to prove the allegations contained therein for the reason that the maker of the SD, Mat Zain, is not available for cross-examination and he has not deposed any affidavit and neither is he a party in this proceedings.

[13] Having perused the cause papers and all affidavits filed herein and having heard submissions of both parties at length, we are of the considered opinion that the determining issue that will dispose of this application is simply this: whether the SD is admissible evidence to support the application encl. 48a?

[14] It is trite that the allegation of fact to disqualify a counsel must be substantially related to the present proceedings. On our plain reading of the SD we find that the allegations in the SD bear no relevance to the facts of the present case as they mainly relate to the 'black eye' incident which has been concluded in other earlier proceedings.

[15] It is pertinent to note that Mat Zain has not deposed any affidavit for the purpose of this application. The SD was referred to only in the body of the applicant's affidavit. We are in agreement with the submissions of Shafee that the contents of the SD is hearsay evidence for the reason that the maker of the SD is not available for cross-examination to enable this court to determine the truth or otherwise of the serious allegations levelled at the persons mentioned in the SD (see *Mayban Assurance Bhd v. Sufian Mohd Said* [1998] 1 LNS 18; [1998] 6 MLJ 170); *Ratanlal and Dhirajlal's Law of Evidence* (22nd edn. 2006); *Earles Utilities Limited v. Jacob* [1934] 51 TLR 43; *Marneedi Satyam v. Masimukkula Venkataswami* [1949] 1 MLJ 434; *PP v. Forster Frank Edald Heinrich* [1987] 2 CLJ 177; [1987] CLJ (Rep) 872; [1988] 2 MLJ 594); *Shamugam S Kanapathy v. Pappah Chinniah Nadar* [1994] 2 CLJ 265; [1994] 1 MLJ 144; *Chew Gim Ser v. PP* [2005] 1 SLR 201).

[16] Further, we note that there are latent defects in the SD in view of the uncontroverted evidence that there are discrepancies in the identity of the maker of the SD, Mat Zain. We say so because firstly, the name and address on the SD in exh. A1 had been 'blotted'. There is no conceivable reason why Mat Zain refuses to disclose particulars of his identity and his address in the SD if he stands by his allegations, when in the defamation suit that he had filed against the applicant at the Shah Alam High Court, he had disclosed his identity and address. Secondly, we find there are discrepancies in his NRIC numbers when compared to his other documents such as the search report from the Insolvency Department and his cause papers in the defamation action against the applicant at the Shah Alam High Court in suit No. MT1-22-1386-2008. For these reasons, we are of the firm opinion that the SD cannot be admitted as evidence which consequently render this application unsupported by cogent and credible evidence. It follows, therefore, that the other grounds raised by the applicant which are grounded on the same impugned SD cannot be sustained. For this reason alone this application ought to be dismissed *in limine*.

[17] That notwithstanding, for completeness we will deal briefly with the other grounds raised by the applicant in the following paragraphs.

[18] The applicant contends that the appointment of Shafee is in breach of arts. 5 and 8 of the Federal Constitution. With respect, we are unable to agree. We are unable to appreciate how the

appointment of Shafee will deprive the applicant of a fair trial because the prosecution of the appeal by Shafee will undoubtedly rest solely on the appeal records prepared by the court. There is no possibility that any evidence favourable to the applicant will be concealed or withheld from the court. Further, it is pertinent to note that Shafee is not the sole DPP appearing for the Public Prosecutor in the appeal. On record, there are with Shafee two senior DPPs from the Attorney General's Chambers in the persons of Dato Mohamad Hanafiah bin Zakaria and Puan Noorin binti Badaruddin who were part of the prosecution team in the court below. It is trite that the role and function of a DPP as well as defence counsel is to assist the court in reaching its decision. Indeed the final decision of the appeal is with the court. In making its decision the court will examine and scrutinise the entire appeal records. With respect, it is therefore inconceivable to suggest that the mere appointment of Shafee to conduct the appeal will deprive the applicant's right to a fair trial.

[19] Having given our anxious consideration to the other grounds raised by the applicant, we find no merit in each of them. These are issues of law which counsel ought to have raised in the applicant's earlier application. The applicant has had ample opportunity to raise these very issues in the first application instead of raising them by way of instalments. We agree that the doctrine of *res judicata*, issue estoppels apply (see *PP v. Lee Siew Ngock* [1966] 1 LNS 143; [1966] 1 MLJ 225; *Harun Abdullah v. PP* [2009] 4 CLJ 717; [2009] 3 MLJ 337; *Ahmadi Yahya v. PP* [2012] 7 CLJ 113; [2012] 6 MLJ 37 and *Law Society of Singapore v. Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239).

[20] As regard the contention of a breach of art. 8, we are of the view that no compelling and cogent evidence has been adduced before us to show that the Public Prosecutor has abused the power conferred upon him to appoint Shafee to conduct the prosecution of the appeal. Under s. 114(e) of the Evidence Act 1950 the court is entitled to presume that official acts have been regularly performed in the absence of evidence of *mala fide* or malice (see *Ramalingam Ravinthran v. Attorney-General* [2012] 2 SLR 49). Therefore we find that there is no other finding that this court can make but to hold that the appointment of Shafee is in accordance with the law.

[21] It is further contended by the applicant that the Public Prosecutor is obliged to proffer reasons for the appointment of Shafee. In our opinion this contention is without merit. The Public Prosecutor is exercising a statutory duty under which no obligation is imposed on him to provide reasons in the exercise of such duty (*Joseph Puspam v. Menteri Sumber Manusia, Malaysia & Anor* [2001] 4 CLJ 252). To require the Public Prosecutor to provide reason in the exercise of his discretionary power, would undoubtedly place upon him an onerous duty not contemplated by the relevant statutes.

[22] The allegation by the applicant on the alleged breach of the rules is unsubstantiated. As we have alluded to earlier, the contents of the SD relied upon is wholly hearsay. Therefore, there is no material which the applicant can rely upon to support the allegation.

[23] Before we conclude, it must be emphasised that to disqualify a counsel is a drastic measure which should not be allowed willy-nilly, unless substantiated by cogent and clear evidence. We find this application bereft of any evidence.

[24] For all the above reasons, we have reached the unhesitating conclusion that this application is devoid of any merit and should stand dismissed.